

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ERIC IBARRA,
Petitioner.

No. 2 CA-CR 2018-0226-PR
Filed October 25, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
Nos. CR20110514001 and CR20113561001
The Honorable Joan Wagener, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Eric Ibarra seeks review of the trial court’s order denying, after an evidentiary hearing, his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Ibarra has not shown such abuse here.

¶2 In CR20110514001, Ibarra was convicted after a jury trial of two counts of sale of a narcotic drug and was sentenced to concurrent prison terms, the longer of which is twelve years. We affirmed his convictions and sentences on appeal. *State v. Ibarra*, No. 2 CA-CR 2016-0387 (Ariz. App. Jun. 29, 2017) (mem. decision). In CR20113561001, Ibarra pled guilty to possession of marijuana, cocaine, and drug paraphernalia, as well as to weapons misconduct, and was sentenced to prison terms to be served concurrently with each other and the sentences imposed in CR20110514001.

¶3 Ibarra sought post-conviction relief in both cause numbers. He argued counsel had failed to advise him of a plea offer by the state in CR20113561001 and had “pressured” him to plead guilty instead of raising “significant illegal search and seizure issues.” With regard to CR20110514001, he argued counsel had failed to “timely file and properly prepare” various pretrial motions. The trial court held an evidentiary hearing limited to Ibarra’s claim related to the plea offer and, after that hearing, denied relief on all of Ibarra’s claims. The court found that Ibarra had been aware of the plea offer and chose to reject it, and had not been pressured by counsel to enter a plea in CR20113561001. The court further concluded that Ibarra had not demonstrated a motion to suppress in that case would have been successful. And, with regard to the motions in CR20110514001, the court concluded the motions either were properly withdrawn by counsel or rendered moot. This petition for review followed.

¶4 On review, Ibarra repeats his claims of ineffective assistance of counsel. To prevail, he “must show that counsel’s performance fell below

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reasonable standards and that the deficient performance prejudiced him.” *Roseberry*, 237 Ariz. 507, ¶ 10 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Ibarra first asserts the trial court erred by finding he was aware of the plea offer in CR20113561001. Counsel’s representation may be found constitutionally deficient if counsel fails to inform the defendant of a plea offer. *See State v. Donald*, 198 Ariz. 406, ¶ 16 (App. 2000).

¶5 In October 2011, the state offered Ibarra a plea in CR20113561001. At that time, Ibarra was represented by Kymberley Sweeney. Sweeney testified that her office would have sent any plea offers to Ibarra and that it was her practice to discuss any plea offer with her client. She acknowledged, however, that she had no “independent recollection” of discussing the plea offer with Ibarra. Sweeney withdrew from representation when Ibarra retained Rafael Gallego, who filed his notice of appearance on December 13, 2011. The following day, the state withdrew the plea offer. Gallego testified that he was aware of the October offer and its related offer in CR20110514001, that Ibarra “was not going to take the plea and he did not hire me to take th[at] plea,” and, in any event, that he would not have recommended Ibarra accept a plea without Gallego first reviewing the case. Ibarra claimed neither attorney had discussed the October plea offer with him.

¶6 Ibarra has cited no authority suggesting that, despite Sweeney’s lack of specific recollection about Ibarra’s case, the trial court could not rely on her testimony that her office would have sent the plea offer to Ibarra and that her practice was to advise her clients about any open plea offers. His argument asks us to reweigh the evidence, which we will not do. *See State v. Fritz*, 157 Ariz. 139, 141 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding). And, in any event, he has not addressed Gallego’s testimony that Ibarra was aware of the offer and had rejected it.

¶7 Ibarra next argues the trial court erred by concluding counsel was not ineffective with regard to pretrial motions in CR20110514001. But in his petition below and on review, Ibarra has not attempted to show any likelihood those motions would have been granted. Absent that showing, this claim necessarily fails. *See State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016) (to make colorable claim of ineffective assistance, defendant must demonstrate both deficient performance and a reasonable probability outcome of proceeding would have been different).

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¶8 Ibarra also asserts the trial court erred by rejecting his claim that counsel should have sought the suppression of evidence in CR20113561001. But, even if we disagreed with the court's conclusion that Ibarra had not demonstrated a suppression motion would have been successful, his claim nonetheless warrants summary rejection. By pleading guilty, Ibarra has waived all non-jurisdictional defects unrelated to the validity of his plea. *See State v. Leyva*, 241 Ariz. 521, ¶ 18 (App. 2017). Ibarra has not explained how counsel's decision not to seek suppression affected the validity of his plea.

¶9 Finally, Ibarra contends the trial court erred in concluding he was not "forced" to enter a guilty plea in CR2011356001, asserting counsel told him he had "no choice" but to plead guilty to the indictment. First, we note that, although Ibarra states in his affidavit that Gallego told him he had "no choice but to plead guilty," he also stated he did so based on Gallego's "suggestion." Thus, his affidavit does not indicate his decision to plead guilty was involuntary or coerced. Additionally, the trial court noted that Ibarra had informed the court during the plea colloquy that he had not been forced or threatened to plead guilty and that he was doing so voluntarily. In sum, Ibarra has not identified any evidence suggesting his guilty plea in CR20113561001 was involuntary.

¶10 We grant review but deny relief.